A **AHMAD JAAFAR ABDUL LATIFF**

v.

DATO' BANDAR KUALA LUMPUR

B FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
C ZALEHA ZAHARI FCJ
[CIVIL APPEAL NO: 01(f)-7-04-2013(W)]
3 NOVEMBER 2014

LOCAL GOVERNMENT: *Local authority - Duties of local authority*
D *- Duty of care to protect road users/public - Plaintiff injured by tree falling onto highway - Whether local authority in breach of duty to maintain/remove dangerous trees along highway - Whether duty extended to maintaining/removing trees located on private property - Whether road user proved tree was dangerous - Whether local authority liable - Local*
E *Government Act 1976, s. 101(b) & (cc)*

TORT: *Breach of statutory duty - Local authority - Duty of care to protect road users/public - Plaintiff injured by tree falling onto highway -*
F *Whether local authority in breach of duty to maintain/remove dangerous trees along highway - Whether duty extended to maintaining/removing trees located on private property - Whether road user proved tree was dangerous - Whether local authority liable - Local Government Act 1976 s. 101(b) & (cc)*

TORT: *Negligence - Duty of care - Doctrine of res ipsa loquitur -*
G *Whether amounts to proof of negligence - Whether doctrine applies where defendant does not have exclusive control over object alleged to have caused damage*

The respondent ('defendant') is a local authority entrusted to
H administer the city of Kuala Lumpur pursuant to the Local Government Act 1976 ('the Act'). The appellant ('plaintiff') was driving his car along Jalan Duta Kuala Lumpur when all of a sudden a tree collapsed and crushed his car ('the accident'). As a result, the plaintiff suffered serious injuries and was paralysed from
I the neck down. The plaintiff brought this action against the defendant for negligence and breach of statutory duties contending that it was the duty of the defendant to ensure that all trees

along the said road were properly trimmed or removed when they posed a danger to the public. The plaintiff relied on the doctrine of *res ipsa loquitur*. The defendant contended that the plaintiff had failed to establish the precise location of the tree that caused the accident and as such, the plaintiff had failed to establish that the tree had posed a danger to the public. Further, it was contended that since the tree was located on a private land, the doctrine of *res ipsa loquitur* could not be invoked in favour of the plaintiff. The High Court, in allowing the plaintiff's claim, held that the defendant was negligent and had breached its statutory duties imposed under s. 101 of the Act. The defendant's appeal to the Court of Appeal was however allowed on the grounds that a court of law could not make a finding of fact that the tree posed a danger to the public when there was insufficient evidence to show the precise location of the tree in question. The Court of Appeal held that the trial judge erred in finding that the tree in question posed a danger to the public just because 'the tree was without leaves and it fell from a slope'. The plaintiff was granted leave to appeal to the Federal Court against the decision of the Court of Appeal on the following question of law: to what extent do the powers conferred under s. 101(b) and (cc) of the Act confer a duty of care on the local authority.

Held (allowing appeal with costs)
Per Raus Sharif PCA (for the majority):

(1) Section 101(cc)(i) clearly imposes a statutory duty on the defendant to remove any tree that is likely to cause danger to public safety. The words in s. 101(cc)(i) have been drafted in such a manner so as to impose responsibility on the defendant. It imposes a duty on the defendant to act and ensure that public roads are kept safe from trees aligned to it. (para 17)

(2) The tree was situated on the hill slope on the left side of the road. The tree was close to 20 meters in height and had no leaves and when it fell, it covered all the four lanes of the highway. On these undisputed facts, the plaintiff had established, on a balance of probability, that the tree posed a danger to the public. (para 19)

(3) It did not matter that the tree was on a private land as, under the Act, the defendant can require the owner or occupier of any premises to remove or trim the tree. The Act also does not prohibit the defendant from entering any private land to cut or trim trees that pose a danger to the public. The

A defendant should have constantly supervised and trimmed all hazardous trees, immaterial of whether the trees stood on its land or otherwise. Section 101 of the Act clearly imposes a duty of care on the defendant, with the duty extending to the defendant to enter into private land to remove or lower or B trim any tree, shrub or hedge before they cause any harm in light of the private land owner's neglect or failure to remove or trim the trees. (para 21)

(4) The words employed in s. 101 is clear in that it imposes a C duty of care on the part of the defendant to protect road users/public. There was a clear abdication of duty on the part of the defendant. Despite having a designated Unit within the defendant's fraternity entrusted to carry out regular inspections, there was no evidence that the Unit conducted D any inspection at the site prior to the accident. (paras 23 & 24)

Per Richard Malanjum CJ (Sabah & Sarawak) (dissenting):

(1) Those duties imposed upon a local authority by s. 101(b) and E (cc) are not absolute but relative and depend on any given factual situation. There is nothing therein that imposes a higher obligation upon a local authority or in the nature of strict liability. The common law on negligence *vis-à-vis* such duties has not been varied by the Act. It is therefore only to F that extent the duty of care is imposed upon a local authority by s. 101(b) and (cc) of the Act. (para 62)

(2) The doctrine of *res ipsa loquitur* did not apply in this case. As such the burden remained with the plaintiff to establish G negligence and breach of statutory duty by the defendant. (para 67)

(3) The doctrine of *res ipsa loquitur* is not a rule of substantive law but rather a principle of evidence. The doctrine of *res ipsa loquitur* does not prove negligence. It only infers the negligence. H The doctrine does not apply when a defendant did not have exclusive control over the property or object that was alleged to have caused the damage or injury. Indeed, it is insufficient for a plaintiff merely to present evidence of defendant's negligence. A plaintiff must show that the type of injury I suffered would not ordinarily occur unless the defendant was negligent. (para 68)

(4) The plaintiff failed to prove his case on a balance of probabilities. Hence the appeal should be dismissed. (para 71)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('defendan') adalah pihak berkuasa tempatan yang diberi kuasa untuk mentadbir Bandaraya Kuala Lumpur menurut Akta Kerajaan Tempatan 1976 ('Akta'). Perayu (plaintif') sedang memandu keretanya di sepanjang Jalan Duta Kuala Lumpur apabila sebatang pokok tiba-tiba tumbang dan menghempap keretanya ('kemalangan tersebut'). Akibat daripada itu, plaintif mengalami kecederaan serius dan lumpuh dari bahagian leher hingga ke bawah. Plaintif membawa tindakan ini terhadap defendan bagi kecuaian dan pelanggaran kewajipan statutori dengan menghujahkan bahawa adalah tanggungjawab defendan untuk memastikan kesemua pokok di sepanjang jalan tersebut dipangkas atau dibuang apabila ia mendatangkan bahaya kepada orang awam. Plaintif menyandar kepada doktrin *res ipsa loquitur*. Defendan menghujahkan bahawa plaintif telah gagal membuktikan lokasi sebenar pokok tersebut yang mengakibatkan kemalangan dan oleh itu plaintif telah gagal membuktikan bahawa pokok tersebut mendatangkan bahaya kepada orang awam. Selanjutnya dihujahkan bahawa, oleh sebab pokok tersebut terletak atas tanah persendirian, doktrin *res ipsa loquitur* tidak boleh dibangkitkan berpihak kepada plaintif. Mahkamah Tinggi dalam membenarkan tuntutan plaintif memutuskan bahawa defendan cuai dan telah melanggar kewajipan statutorinya yang termaktub di bawah s. 101 Akta. Rayuan defendan ke Mahkamah Rayuan telah, walau bagaimanapun, dibenarkan atas alasan-alasan bahawa mahkamah undang-undang tidak boleh membuat dapatan fakta bahawa pokok tersebut mendatangkan bahaya kepada orang awam apabila tidak ada keterangan yang mencukupi untuk menunjukkan lokasi tepat pokok tersebut. Mahkamah Rayuan memutuskan bahawa hakim bicara juga telah terkhilaf dalam membuat dapatan bahawa pokok tersebut mendatangkan bahaya kepada orang awam semata-mata kerana 'pokok itu tidak berdaun dan ia tumbang dari sebuah lereng'. Plaintif diberikan kebenaran untuk merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan atas persoalan undang-undang: setakat mana kuasa yang diperuntukkan di bawah s. 101(b) dan (cc) Akta meletakkan kewajipan berjaga-jaga kepada pihak berkuasa tempatan.

Diputuskan (membenarkan rayuan dengan kos)
Per Raus Sharif PMR (keputusan majoriti):

(1) Seksyen 101(cc)(i) jelas memperuntukkan kewajipan statutori terhadap defendan untuk mengalihkan mana-mana pokok yang berkemungkinan menyebabkan bahaya kepada keselamatan awam. Perkataan-perkataan dalam s. 101(cc)(i) telah digubal untuk meletakkan tanggungjawab ke atas defendan. Ia meletakkan tanggungjawab ke atas defendan untuk bertindak dan memastikan bahawa jalan-jalan awam dijaga dengan selamat daripada pokok-pokok yang terdapat di sepanjangnya.

(2) Pokok tersebut terletak di atas lereng bukit di sebelah kiri jalan. Pokok tersebut hampir 20 meter tingginya dan tidak berdaun dan apabila ia tumbang, ia merentangi keempat-empat lorong di lebuhraya tersebut. Atas fakta-fakta yang tidak dipertikaikan ini, plaintif telah membuktikan, atas imbangan kebarangkalian, bahawa pokok tersebut mendatangkan bahaya kepada orang awam.

(3) Tidak menjadi suatu isu bahawa pokok tersebut terletak di atas tanah persendirian kerana, di bawah Akta, defendan boleh meminta pemilik atau penghuni mana-mana premis untuk membuang atau memangkas pokok tersebut. Akta tersebut juga tidak menghalang defendan daripada memasuki tanah persendirian untuk memotong atau memangkas pokok-pokok yang mendatangkan bahaya kepada orang awam. Defendan sepatutnya mengawasi dan memangkas kesemua pokok yang membahayakan, tanpa mengira sama ada pokok-pokok tersebut berada atas tanahnya atau sebaliknya. Seksyen 101 Akta jelas mengenakan kewajipan berjaga-jaga ke atas defendan, dengan tanggungjawab yang dilanjutkan kepada defendan untuk memasuki tanah persendirian untuk membuang atau mengurangkan atau memangkas apa-apa pokok, pokok-pokok renek atau pagar pokok renek sebelum ia mengakibatkan bahaya berikutan pengabaian atau kegagalan pemilik tanah persendirian untuk membuang atau memangkas pokok-pokok tersebut.

(4) Perkataan-perkataan yang digunakan dalam s. 101 adalah jelas bahawa ia mengenakan kewajipan berjaga-jaga kepada pihak defendan untuk melindungi pengguna jalan raya/orang awam. Terdapat pelepasan tanggungjawab yang jelas pada pihak defendan. Walaupun ia mempunyai Unit dalam fraterniti defendan yang diamanahkan untuk menjalankan pemeriksaan

secara berkala, tidak ada keterangan bahawa Unit itu menjalankan apa-apa pemeriksaan di kawasan tersebut sebelum kemalangan itu berlaku.

Oleh Richard Malanjum (HB (Sabah & Sarawak) (menentang):

(1) Kewajipan-kewajipan yang diletakkan kepada pihak berkuasa tempatan oleh s. 101(b) dan (cc) bukanlah mutlak tetapi berkaitan dan bergantung kepada apa-apa situasi fakta yang wujud. Tidak ada apa-apa di dalamnya yang meletakkan kewajipan yang tinggi kepada pihak berkuasa tempatan atau yang bersifat liabiliti ketat. Common law bagi kecuaian bersabit dengan kewajipan sedemikian tidak diubah oleh Akta. Oleh itu, hanya setakat itu kewajipan berjaga-jaga dikenakan terhadap pihak berkuasa tempatan oleh s. 101(b) dan (cc) Akta.

(2) Doktrin *res ipsa loquitur* tidak terpakai kepada kes ini. Oleh itu, beban kekal pada plaintif untuk membuktikan kecuaian dan pelanggaran kewajipan statutori oleh defendan.

(3) Doktrin *res ipsa loquitur* bukan perintah atau undang-undang substantif tetapi adalah prinsip keterangan. Doktrin *res ipsa loquitur* tidak membuktikan kecuaian. Ia hanya menyimpulkan kecuaian. Doktrin tersebut tidak terpakai apabila seseorang defendan tidak mempunyai kawalan eksklusif terhadap hartanah atau objek yang didakwa mengakibatkan kerugian atau kecederaan. Sememangnya tidak mencukupi bagi plaintif untuk semata-mata mengemukakan keterangan tentang kecuaian defendan. Plaintif mesti menunjukkan bahawa jenis kecederaan yang dialami tidak akan biasanya berlaku kecuali jika defendan cuai.

(4) Plaintif gagal membuktikan kesnya atas imbangan kebarangkalian. Dengan itu, rayuan ini wajar ditolak.

Case(s) referred to:

Batang Kali Estates Sdn Bhd v. Romani Abdul Aziz [1995] 3 CLJ 836 HC ***(refd)***

Caminer & Anor v. Northern & London Investment Trust Ltd [1951] AC 88 ***(refd)***

Cunliffe v. Bankes [1945] 1 All ER 459 ***(refd)***

Gascho v. Clinton (Town) [2011] CarswellOnt 4114 ***(refd)***

Hay Me Kian & Anor v. Dewan Bandaraya Kuching Utara [2008] 2 CLJ 724 HC ***(refd)***

A *Len Omnibus Co Bhd v. North South Transport Sdn Bhd & Anor and Another Appeal [1978] 1 LNS 96 FC* ***(refd)***
MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 FC ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
B *Mersey Docks & Harbour Board Trustees v. William Gibbs & Ors (1866) LR 1 HL 93* ***(refd)***
Noble v. Harrison [1926] 2 KB 332 ***(refd)***
Ohrby v. Ryde Commissioners (1864) 5 B & S 743 ***(refd)***
Ontario Limited v. Windsor (City) [2000] CarswellOnt 1762 ***(refd)***
Owen v. City of Westminster [2004] EWHC 1557 (QB) ***(refd)***
C *Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakum & Others [1997] 9 SCC 552* ***(refd)***
Thomas v. Warwickshire County Council [2011] All ER (D)04 (April) ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 101
D Local Government Act 1976, ss. 101(b), (cc)(i), 115

For the appellant - Harikannan Ragavan (Barvina Punnusamy with him); M/s Jayadeep Hari & Jamil
For the respondent - Prem Ramachandran (Andy Tan with him); M/s Kumar Partnership
E

[Editor's note: For the Court of Appeal judgment, please see Dato Bandar Kuala Lumpur v. Ahmad Jaafar Abdul Latiff [2013] 3 CLJ 987.]

Reported by Amutha Suppayah

F

JUDGMENT

Raus Sharif PCA:

G **Introduction**

[1] This is an appeal against the judgment of the Court of Appeal in allowing the respondent's appeal and consequently setting aside the judgment of the High Court.

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[2] For ease of reference, the parties will be referred to as they were in the High Court. The appellant is the plaintiff and the respondent is the defendant. The defendant is a local authority entrusted to administer the city of Kuala Lumpur pursuant to the
I Local Government Act 1976 ("the Act").

[3] On 21 March 2013, leave to appeal was granted to the plaintiff by this court for the determination on a sole question of law which reads as follows:

> To what extent do the powers conferred under section 101(b) and (cc) of the Local Government Act 1976 confer a duty of care on the local authority.

Background Facts

[4] On 2 October 2000 at about 5pm, the plaintiff was driving his Proton Perdana No. KHJ 2676 along Jalan Duta Kuala Lumpur heading towards his office situated at Shell Malaysia Trading Sdn Bhd in Damansara Heights. The plaintiff's car was on the left lane of Jalan Duta about one hundred and fifty metres away before turning into Damansara Heights when all of a sudden a tree collapsed and crushed his car ("the accident"). As the result of the accident, the plaintiff suffered serious injuries and is now paralysed from neck down. His car was also badly damaged.

[5] The facts further revealed that the tree was situated on a hill slope on the left side of the road. The tree was close to one hundred feet in height. It had no leaves, and when it fell it covered all the four lanes of the highway. And it is also not in dispute that the accident happened after a thunder storm.

[6] On 23 May 2002, the plaintiff brought this action against the defendant for negligence and breach of statutory duties. The plaintiff contended that it was the duty of the defendant to ensure that all trees along the said road were properly trimmed or removed when they posed a danger to the public. And the defendant would be liable if it failed to carry out that duty and if such danger resulted in an accident. On the burden of proof the tree was a danger to the public and the plaintiff relied on the doctrine of *res ipsa loquitur*, thereby satisfying and shifting the burden to the defendant to rebut otherwise.

[7] The defendant in response to the plaintiff's action contended that the plaintiff had failed to establish the precise location of the tree that caused the injuries and damage to him. And as such the plaintiff had failed to establish that the tree had posed a danger to the public. Further it was contended that since the tree was located on a private land the doctrine of *res ipsa loquitur* could not be invoked in favour of the plaintiff.

A **At The High Court**

[8] The learned High Court Judge (trial judge) found that the defendant was negligent and had breached its statutory duties imposed under s. 101 of the Act. In his judgment the trial judge B recognised the fact that the parties were unable to point out the exact location of the fallen tree but ruled that s. 101 of the Act imposes a duty on the defendant to remove or trim any tree, shrub or hedge which in its opinion was likely to endanger public safety. The trial judge further held that the statutory duty of the C defendant under s. 101 of the Act was not limited to overseeing the trees planted by the defendant, but also extended to all trees in the city of Kuala Lumpur. It was held that the defendant is vested with the power to insist upon the owners of any private land to maintain trees, and if they failed to do so, the defendant D can take action and subsequently bill the owners of the said private land. The court concluded that the tree had posed a danger to the public considering that the tree was on a slope, a hundred feet tall and without leaves. The court observed that the tree could not have gone unnoticed if regular inspection and E patrols were carried out by the defendant.

At The Court Of Appeal

[9] At the Court of Appeal the defendant argued that:

F (a) The precise location of the tree which occasioned the injury and damage was never identified by the plaintiff;

(b) The fact that the tree was located on private land did not in itself afford a basis for the court to invoke the doctrine of *res ipsa loquitur* in favour of the plaintiff; and

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(c) The burden of proving that the tree posed a danger to the public vested with the plaintiff and the plaintiff failed to discharge the burden.

H **[10]** The Court of Appeal agreed with the arguments of the defendant and held as follows:

(a) The location of the tree was of primary importance since a court of law could not make a finding of fact that the tree I posed a danger to the public when there was insufficient evidence to show the precise location of the tree. The trial judge erred in finding that the tree in question posed a danger to the public just because "the tree was without leaves and it

fell from a slope". Not every tree that is located on a slope poses a danger to the public. There was no evidence of the gradient and soil structure of the slope or any other evidence to suggest that the tree in question was unstable due to its location on the slope.

(b) The vicinity of the accident was a "kawasan pokok batai". The trial judge's finding, carried to its logical conclusion, implied that all the trees without leaves of the "batai" species located near the highway in Jalan Duta posed a danger to the public and ought to be removed. This conclusion was clearly unwarranted unless there was evidence that the trees were unstable, likely to fall across the nearby highway due to instability or being diseased. Accordingly, in the absence of expert evidence, the trial judge had erred in concluding that the tree posed a danger to the public merely because it was located on a slope and had no leaves.

(c) This error on the part of the trial judge warranted appellate interference. The plaintiff failed to discharge the burden of proving that the defendant was in breach of its duty of care. The absence of expert evidence was understandable because the plaintiff adopted, with respect, the erroneous position that he was entitled to rely on the doctrine of *res ipsa loquitur*.

[11] The full judgment of the Court of Appeal can be found in [2013] 3 CLJ 987.

Submissions

[12] Learned counsel for the plaintiff submitted that pursuant to s. 101(b) and (cc)(i) of the Act, a duty is imposed on the defendant to act and ensure that public roads are kept safe from trees that are aligned to it. It is a continuous duty imposed on the defendant by statute and the defendant must take positive steps towards discharging this duty. And it was submitted that the defendant did absolutely nothing in the discharge of its duty. This according to learned counsel was admitted by the defendant's witnesses, DW1 and DW2 that:

(a) The unit pengurusan pokok rendang ("the unit") is the unit within DBKL that is entrusted with the duty of planting, trimming, removing or trimming the trees along Jalan Duta;

(b) The unit had about ten staff but was without a head or "ketua" at the material time until Khairul Azlan (DW1) took over that position on 16 October 2002;

(c) The unit did not conduct any inspection at the site prior to the accident;

(d) The unit did not inspect the site at the time of the accident to determine the cause of the accident;

(e) The unit only examined the site some three years later after they were served with the writ of summons; and

(f) The unit will only inspect trees that the defendant planted.

[13] Thus, it was submitted that in light of the above evidence coming from the defendant's witnesses, the trial judge was right in holding that the defendant had failed to proffer any evidence to suggest that regular patrols and inspection had actually been done. It was further submitted that the trial judge was right in holding that, had regular patrol and inspection been done in that area, "the unit would have noticed this hundred feet tree without leaves standing by the slope. It should have attracted their attention. A tree without leaves standing upright in the midst of the lush green of Jalan Duta should never escape the attention of the unit".

[14] On the issue of whether the tree in question did pose a danger to the public, learned counsel was relying on the doctrine of *res ipsa loquitur*. According to him, the doctrine of *res ipsa loquitur* applies because:

(a) There was an unexplained occurrence ie, the tree fell;

(b) The unexpected occurrence would not have happened in the ordinary course of things without the negligence on the part of somebody other than the plaintiff and in this case the plaintiff had nothing to do with the tree falling; and

(c) The evidence points to the negligence of the defendant rather than some other person.

[15] Learned counsel for the defendant took a diametrically opposed view in that the powers conferred under s. 101(b) and (cc) of the Act is invoked only when the element of danger is present. Section 101(cc) of the Act clearly outlines that the power to remove, lower or trim any tree, shrub or hedge by the local authority only arises if the element of danger to the public is

present. As such learned counsel submitted that pursuant to s. 101(cc) of the Act, before the local authority could exercise its powers, it must first be shown that the tree in question had posed a danger to the public. To this end learned counsel submitted that since the plaintiff had alleged that the defendant had failed to carry out its powers under s. 101(b) and 101(cc) of the Act, it was the plaintiff's burden of proof to show that the element of danger was eminent before this court could decide whether indeed the defendant had failed to exercise its powers under the said provisions. In support of his proposition learned counsel cited the cases of *Hay Me Kian & Anor v. Dewan Bandaraya Kuching Utara* [2008] 2 CLJ 724; *Batang Kali Estates Sdn Bhd v. Romani Abdul Aziz* [1995] 3 CLJ 836; [1995] 3 MLJ 104; *Len Omnibus Co Bhd v. North South Transport Sdn Bhd & Anor & Another Appeal* [1978] 1 LNS 96; [1978] 2 MLJ 246; *Caminer & Anor v. Northern & London Investment Trust Ltd* [1951] AC 88; *Cunliffe v. Bankes* [1945] 1 All ER 459; *Noble v. Harrison* [1926] 2 KB 332; *Thomas v. Warwickshire County Council* [2011] All ER (D) 04 (April); *Owen v. City of Westminster* [2004] EWHC 1557 (QB); *Gascho v. Clinton (Town)* [2011] CarswellOnt 4114; *Ontario Limited v. Windsor (City)* [2000] CarswellOnt 1762; and *Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakum & Others* [1997] 9 SCC 552.

A B C D E

Findings

[16] Based on the sole question of law posed in the instant appeal we are to determine to what extent the powers conferred under s. 101(b) and (cc) of the Act confers a duty of care on the local authority in this case ie, the defendant; and whether a duty of care exists; and, if so, what is the scope and extent of that duty. At the heart of this appeal lies the true interpretation to be given to s. 101(b) and (cc) of the Act. In short, this court is to determine whether the defendant owes a duty of care towards the plaintiff in the instant case and if the answer is in the affirmative the extent of the duty; and, whether the defendant had breach such duty. The relevant s. 101(b) and (cc) of the Act states that:

F G H

> In addition to any other powers conferred upon it by this Act or by any other written law, a local authority shall have power to do all or any of the following things, namely:
>
> (b) to plant, trim or remove trees;
>
> (cc) to require the owner or occupier of any premises to do any of the following acts:

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A (i) To remove, lower or trim to the satisfaction of the local authority any tree, shrub or hedge overhanging or interfering in any way with the traffic on any road or street or with any wires or works of the local authority is likely to endanger the public safety or convenience and in the event of any tree situated in private premises falling across any public road or street the local authority may remove the fallen tree and the expenses incurred shall be charged on and recoverable from the owner or occupier thereof;

C (ii) To remove any dilapidated fence or structure abutting upon any public place and if such owner or occupier fails to comply with any such request any authorised officer of the local authority may enter upon the said premises and carry out such work and the provisions of section 115 shall apply to the expenses incurred thereby.

[17] There is no doubt that s. 101(cc)(i) clearly imposes a statutory duty on the defendant to remove any tree that is likely to cause danger to public safety. The words in s. 101(cc)(i) is E clear and unambiguous. It has been drafted in such a manner so as to impose responsibility on the defendant. It imposes a duty on the defendant to act and ensure that public roads are kept safe from trees aligned to it.

F **[18]** The question is whether the defendant was negligent in failing to act and ensure that the public road where the accident occurred was kept safe from trees that aligned it, including the taking of positive steps towards discharging that duty. It is trite that the burden lies on the plaintiff to establish its case on a G balance of probability that the defendant was negligent. (See *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389).

[19] The Court of Appeal in reversing the decision of the High Court placed much emphasis on the location of the tree to prove H danger. In its judgment the Court of Appeal held that "the location of the tree is of primary importance since a court of law cannot make a finding of fact that the tree posed a danger to the public when there is insufficient evidence as to the precise location of the tree. With respect, such a finding of the Court of Appeal I is contrary to the undisputed facts of this case. It is an undisputed fact that the tree was situated on the hill slope on the left side of the road. The tree was close to 20 metres in height.

It had no leaves and when it fell it covered all the four lanes of the highway. I am of the view that on the said undisputed facts, the plaintiff had established on a balance of probability that the tree posed a danger to the public.

[20] Thus, the issue now is whether the defendant had breached the duty of care, and the extent of such breach. From the report prepared by the defendant, it was admitted that the fallen tree was never maintained by the defendant because the tree was on a private land. For easy reference, I hereby reproduce the laporan 'Pokok Tumbang di Jalan Duta' in its original language extracted from the grounds of judgment of the High Court:

Tarikh Kejadian	: 2.10.2000 pukul 6.00 petang
Tempat Kejadian	: Tepi Jalan Duta
Hak Selenggara	: Pokok batai tinggi 20 meter tumbuh di lereng bukit di dalam tanah persendirian di lot no.76 & nombor 8262
Kerosakan Harta dan nyawa awam	: Pokok tersebut telah menimpa Encik Ahmad Jaafar bin Abdul Latiff
Punca Kejadian	: Hari hujan lebat dan angin ribut
Selenggara pokok	: Tiada selenggaraan kerana pokok di dalam tanah persendirian.

[21] It is clear from the report prepared by the defendant that the fallen tree was actually from two pieces of private land which the defendant had no control over. Thus, the defendant's stance was that any mishap to the road users caused by the trees located on private land was not within their jurisdiction. With respect, I disagree. In my considered view it does not matter that the tree was on a private land, as under the Act the defendant can require the owner or occupier of any premises to remove or trim the tree. The Act also does not prohibit the defendant from entering any private land to cut or trim trees that pose a danger to the public. The defendant should have constantly supervised and trimmed all hazardous trees, immaterial of whether the trees stood on its land or otherwise. Section 101 of the Act clearly imposes a duty of care on the defendant, with the duty extending to the defendant to enter into private land to remove or lower or trim any tree, shrub or hedge before they cause any harm in light of the private land owner's neglect or failure to remove or trim the trees.

[22] Based on the aforesaid provision the obvious danger to road users brought about by the tree aligned to the highway along Jalan Duta would justify the defendant entering the private property to remedy the situation. Unfortunately the defendant did not do so premised in the misconceived notion that it was not their business. I find that s. 101 of the Act is worded in imperative terms, leaving no room for any discretion for the local authority in the exercise of its duty. The defendant was statutorily empowered to take the appropriate action when any breach is "likely to endanger the public safety" namely to trim the tree or to require the owner or occupier of any premises to remove, lower or trim any tree. The words so employed in s. 101(cc)(i) of the Act ie, "likely to endanger" gives rise to the probability of the occurrence of such incident that triggers the safety standard required by the local authority to take action before harm is caused.

[23] Section 101(cc)(i) is a statutory duty which imposes a responsibility on the defendant to act and ensure that public roads are kept safe from trees aligned to it. As an authority for this proposition I refer to the case of *Ohrby v. Ryde Commissioners* (1864) 5 B & S 743 cited by learned counsel for the plaintiff. The Ryde Commissioners in that case were responsible to place fences on the footways for the protection of foot passengers. The commissioners failed to carry out this duty. The plaintiff then slipped and fell off from the highway resulting in personal injuries. The court held that as a result of the powers given to the commissioners, they had a duty to ensure that the footways were safe and hence liable for any injuries caused by their failure. The English King's Bench Division held that:

> The defendants are liable both at common law and under stat. 10 and 11 Vict. C. 34. With respect to the former, the rule is that when a public body are required by statute to do a particular thing which must be a nuisance they are protected; but where the statute entrusts them with the performance of public duties, and they perform them in a negligent manner, from which damage ensues, they are liable to be sued. They are also liable under the latter. The management of streets is completely vested in the Commissioners by ss. 47, 48, 49; and s. 52 while it leaves in their discretion whether they will put posts or fences, renders it imperative on them to keep such in repair if they do put them. And were this even otherwise, the word "may" in an Act of Parliament is construed to mean "shall" when the Act is for the protection of the public.

> The Commissioners are not, in our opinion, invested with an absolute discretion as to whether they will place fences by the footways for the protection of foot passengers, but that it is their duty to do so.

In the case of *Ohrby v. Ryde Commissioners (supra)*, much emphasis was placed by the court on the imperative words employed in the statute governing the duties of the commissioners to impose a common law duty on the public authority for the protection of the road users/public. Similarly in our case I am of the considered view that the words employed in s. 101 is clear in that it imposes a duty of care on the part of the defendant to protect road users/public.

[24] In my judgment I find that there is clear abdication of duty on the part of the defendant. Despite having a designated unit within the defendant's fraternity entrusted to carry out regular inspections, there is no evidence that unit conducted any inspection at the site prior to the accident. In fact there is no evidence that the unit even inspected the accident site at the time of the accident to determine the cause of the accident. I am of the view that the unit was duty bound to patrol and inspect the place which is within its territory (including the place of the accident) at all material times. Having done so, the unit was then required to enter and maintain its daily logbooks, which should contain its observations or findings, so as to decide on the next cause of action to be taken. This is the very purpose why the unit was created. Unfortunately as admitted by the defendant, no investigation was conducted immediately right after the accident. The bitter fact was that the defendant only carried out investigation concerning the cause of the accident after receipt of the writ of summons, about three years after the occurrence of the accident. It is surprising to note that there is nothing from the facts of this case to indicate that the defendant, in maintaining its roads, had made regular or routine checks on trees standing on the slopes along Jalan Duta. This is certainly not a situation where it was a tree in apparent good health but collapsed due to the ravages of a disease that could not be perceived in the course of a careful layman's inspection. To this end I agree with the observation made by the trial judge that the defendant should not have missed the 'Batai' tree, "a tree without leaves standing upright in the midst of the lush green of Jalan Duta" if regular or routine checks had been conducted by the defendant. What the trial judge was trying to convey through his judgment was the element of foresight and due diligence which I feel was wanting on the part of the defendant.

[25] In this regard I would like to refer to the House of Lords case of *Mersey Docks & Harbour Board Trustees v. William Gibbs & Ors* (1866) LR 1 HL 93, wherein the principle postulated was that "if knowledge of the existence of a cause of mischief makes a person responsible for the injury it occasions, they will be equally responsible when by their culpable negligence, its existence is not known to them". This was an action brought against the authority in control of a shipping dock which was entrusted with cleaning, supporting and preserving the said dock. There was no doubt that it was their duty to perform the work imposed on them by the Act of the Legislature. A ship called the Sierra Nevada, in entering, or endeavouring to enter one of the docks, sustained injury by reason of a bank of mud left negligently at its entrance. The ship and its cargo were damaged due to striking a large bank of mud while navigating through the dock. Lord Cranworth in his judgment placed much emphasis in the element of knowledge. His Lordship in doing so held as follows:

> The declaration alleged knowledge, the evidence shewed that the means of knowledge were fully within the power of the Defendants. If they neglected to avail themselves of those means, they rendered themselves liable for any consequences that might thereby occur.
>
> If the knowledge of the existence of the mud bank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its existence was not known to them.

Mr Justice Blackburn held at p. 103 that:

> ... in effect, that it was not necessary to prove knowledge on the part of the Defendants or their servants of the unfit state of the docks, and that proof that the Defendants, by their servants, had the means of knowledge and were negligently ignorant of it, would entitle the Plaintiff to the verdict,

[26] In the instant case I cannot accept this indifferent attitude in order to absolve the defendant of its duty of care. At the risk of repeating, I would like to highlight that a duty has been imposed on the defendant *vide* s. 101 of the Act in clear terms. A specific duty has been created by the legislature, to be discharged by the defendant, for road users and the prevention of any harm which may be created. In my judgment, on the facts of this case the defendant in the execution of its duty as imposed by the legislature had failed to exercise to the best of its ability skill, diligence and caution.

[27] Since it is my findings that the defendant owes a duty of care towards the plaintiff, and has breached that duty, I do not propose to dwell into the issue of whether the doctrine of *res ipsa* loquitur applies in this case. My decision to not touch on the issue of *res ipsa loquitur* is in consonant to the findings of the High Court and the Court of Appeal as this doctrine was not an issue before them. Based on the forgoing reasons, my answer to the sole question of law posed is that s. 101(b) and (cc) of the Act confers a duty of care on the local authority and the extent of that duty covers both to public and private land.

[28] Accordingly, the appeal is allowed with costs. The orders of the Court of Appeal are therefore set aside. The orders of the High Court are reinstated.

[29] My learned brothers, Suriyadi Halim Omar FCJ and Ahmad Maarop FCJ had the opportunity of reading my judgment in draft and they hereby concur with all the reasons stated therein that this appeal must be allowed with costs.

Richard Malanjum CJ (Sabah & Sarawak):

Introduction

[30] The appellant is dissatisfied with the decision of the Court of Appeal reversing the decision of the High Court. In his judgment the learned High Court trial judge ('the learned trial judge') held the respondent liable for negligence and 'a breach of statutory duties imposed by s. 101 of the Local Government Act 1976 ('the Act').

[31] This appeal is therefore only on the issue of liability. There is one question posed for consideration. It reads:

> To what extent do the powers conferred under Section 101(b) and (cc) of the Local Government Act 1976 confer a duty of care on the local authority.

Background Facts

[32] It was not in dispute that on 2 October 2000 at about 5pm the appellant was driving his car, a Proton Perdana bearing registration number KHJ 2676 along Jalan Duta, Kuala Lumpur on the left side of the road. He was about 150 metres away from the junction to Damansara Heights where his office, Shell Malaysia

A Trading Sdn Bhd was located. Suddenly a tree ('the tree') fell on his car. The appellant was severely injured and his car was damaged as well. The tree that fell was on a private land.

[33] Due to the injuries he sustained and the damage to his car
B the appellant commenced an action against the respondent for breach of duty and negligence.

Before The High Court

[34] It was the case for the appellant that the respondent had
C breached its statutory duty under s. 101 of the Act. It was asserted that the respondent was tasked under the Act to oversee all trees in the city irrespective of where they were located.

[35] The appellant contended that the duty of the respondent
D included the responsibility of ensuring that all trees were properly trimmed or removed once they posed a danger to the public. The respondent would be made liable if it failed to carry out the duty and if such danger resulted in an accident.

E **[36]** As regards the element of danger to the public the appellant relied on the doctrine of *res ipsa loquitur* ('the doctrine') thereby shifting the burden to the respondent to rebut otherwise.

[37] In response to the claim of the appellant the respondent argued that the appellant had failed to establish the precise
F location of the tree that injured and caused damage to him. As such the appellant could not allege that the tree had posed a danger to the public.

[38] Further, the respondent submitted that since the tree was
G located on a private land the doctrine could not be invoked in favour of the appellant.

[39] In his judgment the learned trial judge did not expressly rely on the doctrine to find that the appellant had discharged the
H burden of proof for his claim.

[40] The learned trial judge went on to hold that the duty of the respondent extended to trees on private land and as such he did not consider the location of the trees as crucial in coming to his finding.

I

[41] And in finding that the appellant had established that the tree was a danger to the public the learned trial judge premised his conclusion on the following facts, *inter alia*:

(a) That the tree was 20 metres tall and without leaves; and

(b) That the tree was on a slope.

[42] The learned trial judge therefore found that the respondent was liable for negligence on the following grounds:

(i) In view of the conditions and location of the tree it should not have escaped the attention of the Unit Pengurusan Pokok Rendang ('the unit') of the respondent when and if they had carried out regular inspection;

(ii) The respondent failed to proffer any evidence including any record to suggest that regular patrols and inspection were carried out in the area;

(iii) The report produced by the respondent only stated 'tiada selenggaraan kerana pokok dalam tanah persendirian'; and

(iv) The defence of Act of God did not apply in the circumstances of the case.

[43] For the aforesaid reasons the learned trial judge concluded that he was satisfied that there was negligence on the part of the respondent and that the respondent had also breached its statutory duties imposed by s. 101 of the Act.

Before The Court Of Appeal

[44] Dissatisfied with the decision of the learned trial judge the respondent appealed to the Court of Appeal.

[45] While conscious of the constraint in interfering with the findings of the learned trial judge the Court of Appeal considered the respective contentions of the parties.

[46] And having done so the Court of Appeal held that in order for the learned trial judge to make a finding of fact that the tree had posed a danger to the public its location on private land or otherwise must be first determined from the evidence adduced. In this case the Court of Appeal held that the appellant failed to produce any evidence as to the exact location of the tree.

[47] The Court of Appeal also held that the learned trial judge erred in finding that the tree fell from a slope based on the evidence of PW2 and from an admission by the respondent as contained in a report prepared by DW2. Yet at the same time the learned trial judge acknowledged that DW2 only assumed that the tree was on a private land.

[48] It was further held that even if the exact location of the tree was not critical the learned trial judge erred in finding the tree posed a danger to the public because it was without leaves and fell from a slope. The Court of Appeal held that not every tree located on a slope would pose a danger to the public without any evidence on the gradient and soil structure of the slope.

[49] The Court of Appeal acknowledged that at the time and place of accident the wind was very strong and raining heavily as well. It was also noted that the tree was without leaves and of Batai species. The Court of Appeal therefore opined that the appellant should have called an expert to give an opinion whether a tree of Batai specie without leaves would normally be diseased. Such view was expressed because the learned trial judge seemed to have implied that all Batai trees without leaves located along Jalan Duta posed a danger to the public and ought to be removed. The Court of Appeal therefore held that without such expert evidence the irresistible conclusion would be that the appellant failed "to discharge the burden of proving" that the respondent was in breach of its duty of care. Failing to notice 'a tree without leaves standing upright in the midst of the lush green of Jalan Duta' could not result in the transfer of the burden of proving that the tree posed a danger to the public.

Before This Court

Submissions For The Appellant

[50] In submitting for the appellant his learned counsel argued that the Court of Appeal erred in reversing the decision of the learned trial judge for the following reasons:

(i) The respondent has a continuous duty under s. 101(b) and (cc)(i) of the Act 'to act and ensure that public roads are kept safe from trees that align it'. And that the respondent 'must take positive steps towards discharge of this duty';

(ii) The respondent 'did absolutely nothing in the discharge of its duty'; A

(iii) The respondent failed to produce any report that patrol or inspection had been carried out on regular basis before the accident. As such the respondent had failed 'to prove that it did discharge its duties'. Hence, the respondent could not 'assert that no action was taken as the tree in question did not pose a danger to the public'. Accordingly, 'the respondent was liable for negligence ... because but for this omission, the accident would not have happened'; B C

(iv) That the appellant was entitled to rely on the doctrine of *res ipsa loquitur*, as a proof that the tree which fell and almost killed the appellant, 'was in a dangerous position/location'. As such, the burden shifted to the respondent to rebut that the tree did not pose a danger to the public, failing which the respondent was liable for negligence; and D

(v) The Court of Appeal therefore 'erred in law and in fact when it refused to invoke' the doctrine.

E

Submissions For The Respondent

[51] For the respondent it was contended that the 'duty of care that is owed by the respondent to the appellant' was 'limited to s. 101' of the Act. F

[52] While the respondent 'has the power to plant, trim or remove trees' under s. 101(b) of the Act, its obligation and power to act under s. 101(cc) only arises 'if the element of danger to the public is present'. 'Without the element of danger present' the respondent could not 'simply remove, lower or trim any tree, shrub or hedge' pursuant to the said s. 101(cc) of the Act. G

[53] In other words, 'the powers conferred on the local authority such as the respondent under s. 101(b) and (cc)' of the Act 'is subject to the element of danger being present and proven based on the reading of the said sections'. H

[54] The burden was therefore upon the appellant to establish first that the tree was a danger to the public before the accident occurred. In this case the appellant failed to do so. I

[55] By 'merely by relying on the fact that a tree fell and so the respondent must be held liable', would not 'discharge the burden of proof on the appellant's shoulder'. Moreover, the doctrine of *res ipsa loquitur* did not apply in this case as found by the Court of Appeal which held that 'just because the tree in question was on a slope, without any leaves and of "Batai" species', it did not necessarily mean that the tree was dangerous to the public.

[56] It was also submitted that s. 101 of the Act did not impose a strict liability upon the respondent as to relieve the appellant the burden 'to show that the respondent had failed to act within the powers conferred to it under s. 101(b) and (cc)' of the Act before the respondent could be found to be liable.

[57] In summary, it was the submission of learned counsel for the respondent that 'the appellant must first show that the element of danger was present, that the respondent had failed to carry out the powers conferred on it under s. 101(b) and (cc)' of the Act and that 'only then could the respondent be found to have breached its duty of care towards the appellant'.

Findings

[58] In considering this appeal I bear in mind the question posed before me, namely, To what extent do the powers conferred under s. 101(b) and (cc) of the Local Government Act 1976 confer a duty of care on the local authority.'

[59] Section 101(b) and (cc) of the Act reads:

> 101. In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely:
>
> (b) to plant, trim or remove trees;
>
> (cc) to **require the owner or occupier of any premises** to do any of the following acts:
>
> (i) **to remove, lower or trim to the satisfaction of the local authority any tree,** shrub or hedge overhanging or interfering in any way with the traffic on any road or street or with any wires or works of the local authority or **which in the opinion of the local authority is likely to endanger the public safety** or convenience and in the event of **any tree situated in private premises falling across any public road or street** the local authority

may remove the fallen tree and the expenses incurred shall be charged on and recoverable from the owner or occupier thereof;

(ii) to remove any dilapidated fence or structure abutting upon any public place and **if such owner or occupier fails to comply** with any such request any authorized officer of the local authority may enter upon the said premises and carry out such work and section 115 shall apply to the expenses incurred thereby'. (emphasis added).

[60] The foregoing statutory provisions are clear on the statutory obligations of a local authority of which the respondent is one. Section 101(b) stipulates a direct duty for a local authority 'to plant, trim or remove trees'. Meanwhile, s. 101(cc) authorises, *inter alia*, a local authority to require an owner or occupier of premises 'to remove, lower or trim to the satisfaction of the local authority any tree, shrub or hedge overhanging or interfering in any way with the traffic on any road or street or with any wires or works of the local authority or which in the opinion of the local authority is likely to endanger the public safety'. In the event of the owner or occupier of the premises failing to comply with the request by the local authority 'any authorised officer of the local authority may enter upon the said premises and carry out such work and s. 115 shall apply to the expenses incurred thereby'.

[61] Whether it is a direct duty or authorised to request another party to perform certain tasks, it remains the duties for a local authority to perform. It is the extent of those duties that requires consideration.

[62] I begin by stating that those duties imposed upon a local authority by s. 101(b) and (cc) are not absolute but relative and depend on any given factual situation. There is nothing therein that imposes a higher obligation upon a local authority or in the nature of strict liability. The common law on negligence *vis-à-vis* such duties has not been varied by the Act. It is therefore only to that extent the duty of care is imposed upon a local authority by s. 101(b) and (cc) of the Act:

[63] Bearing therefore in mind the foregoing I now examine this case as presented.

[64] Premised on the two provisions the appellant alleged that the respondent was negligent in failing 'to act and ensure that public roads are kept safe from trees that align it' and such negligence included failing to 'take positive steps towards discharge of this duty'.

[65] With respect, the allegation invites an examination of the factual situation and since it is the appellant who is making it the burden falls upon him to establish it on the balance of probability. (See: Section 101 of the Evidence Act 1950; *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389). It must also be borne in mind that 'negligence is a question of fact and not of law, that each case must depend on its own facts'. (See: *MA Clyde v. Wong Ah Mei & Anor* [1970] 1 LNS 73; [1970] 2 MLJ 183).

[66] In this case the appellant relied heavily upon the doctrine of *res ipsa loquitor* to say that the respondent was negligent. However, the courts below did not find the doctrine applicable. The learned trial judge held that the 'burden is certainly on the plaintiff to prove negligence on the part of the defendant or that there was a breach of statutory duty by the same'. The Court of Appeal ruled that the 'absence of expert evidence is understandable because the respondent adopted, with respect, the erroneous position that he was entitled to rely on the doctrine of *res ipsa loquitur*'.

[67] I agree with the findings of the courts below. The doctrine of *res ipsa loquitur* did not apply in this case. As such the burden remained with the appellant to establish negligence and breach of statutory duty by the respondent.

[68] It was held that the 'fundamental basis of the maxim (*res ipsa loquitur*) is that the rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it, may cause hardship to the plaintiff if it is impossible for him to know what precise acts of omission led to his damage, and this is most obviously so where the cause of the damage is peculiarly within the means of knowledge of the defendant who caused it. This hardship can sometimes be avoided by the application of the maxim *res ipsa loquitur*'. (See: *MA Clyde v. Wong Ah Mei & Anor (supra)*). It should also be noted that the doctrine is not a rule of substantive law but rather a principle of evidence. The doctrine of *res ipsa loquitur* does not prove negligence. It only infers the

negligence. And the doctrine does not apply when a defendant did not have exclusive control over the property or object that alleged to have caused the damage or injury. Indeed it is insufficient for a plaintiff merely to present evidence of defendant's negligence. A plaintiff must show that the type of injury suffered would not ordinarily occur unless the defendant was negligent.

[69] In its judgment the Court of Appeal held that 'the location of the tree is of primary importance since a court of law cannot make a finding of fact that the tree posed a danger to the public when there is insufficient evidence as to the precise location of the tree'.

[70] Bearing in mind my view on the extent of the duties of a local authority under s. 101(b) and (cc) and having considered the reasons given by the Court of Appeal in overturning the decision of the learned trial judge, I find no reason to interfere with the conclusion of the Court of Appeal. I find that the learned trial judge erroneously came to his conclusion based on some assumptions as highlighted by the Court of Appeal.

Conclusion

[71] Accordingly, I agree with the Court of Appeal that the appellant failed to prove his case on the balance of probability. Hence this appeal is dismissed. I order no costs in view of the unfortunate situation of the appellant. Deposit is to be refunded to the appellant.

[72] Madam Justice Zaleha Zahari FCJ has read this judgment in draft. She has indicated her concurrence to it.